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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 In re: TERRORIST ATTACKS ON
4 SEPTEMBER 11, 2001

03 MDL 1570 (GBD)

Conference

5 New York, N.Y.
6 May 24, 2018
10:15 a.m.

7 Before:

8 HON. SARAH NETBURN,

9 Magistrate Judge

10
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(Case called)

THE DEPUTY CLERK: Counsel, please state your names for the record.

MR. CARTER: Good morning, your Honor. Sean Carter on behalf of the PECs.

THE COURT: Good morning.

MR. POUNIAN: Steven Pounian, also on behalf of the PECs.

MR. HAEFELE: Good morning, your Honor. Robert Haefeale on behalf of the PECs.

MR. COZEN: Good morning, your Honor. Steve Cozen on behalf of the PECs.

MR. GOLDMAN: Good morning, your Honor. Jerry Goldman on behalf of the PECs.

MR. MALONEY: Good morning, your Honor. Andrew Maloney on behalf of the PECs.

MR. KREINDLER: Good morning, your Honor. Jim Kreindler.

MS. FLOWERS: Good morning. Jodi Flowers on behalf of the plaintiffs and the PECs.

MR. TARBUTTON: Good morning, your Honor. Scott Tarbutton, of Cozen O'Connor, on behalf of the PECs.

MR. KELLOGG: Good morning, your Honor. Michael Kellogg on behalf of Saudi Arabia. With me are my colleagues Greg Rapawy and Dan Dorris. Mr. Dorris has not yet filed a *pro*

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1 *hac vice*, but is going to do so shortly. We also have with us
2 our Saudi counsel, Abdulaziz al Fahad.

3 THE COURT: Thank you. Welcome, and we will look
4 forward to your *pro hac vice* application.

5 Let me just reminded everybody to be sensitive to the
6 court reporter. We have a lot of people in the room. If you
7 haven't made an appearance and you intend to speak, certainly
8 introduce yourself.

9 (Discussion off the record between the court and court
10 reporter)

11 THE COURT: In case you doesn't hear that, because she
12 not on mike, everyone needs to speak into the microphone. This
13 courtroom is absolutely glorious but has terrible acoustics, so
14 please be sure you are speaking into the microphone so that
15 everybody can hear you.

16 Okay. We are here primarily to check in on the status
17 of jurisdictional discovery as against the Kingdom of Saudi
18 Arabia.

19 I have received the parties' May 21 letters, and so I
20 want to talk about where things stand with respect to that
21 discovery, give you some preliminary reactions to the disputes
22 that are at least raised. It appears that the parties don't
23 contemplate these letters to be their briefs, though I think I
24 can give you a little bit of guidance to make narrow some of
25 the disputed issues.

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1 In addition, I want to talk about sort of the end
2 game, as it were, and what the parties are thinking as far as
3 returning this part of the litigation back to Judge Daniels. I
4 have some thoughts about that.

5 And then, lastly, I want to speak about the letter
6 that was filed by the Plaintiffs' Executive Committee on May 23
7 regarding the requests for short-order forms with respect to
8 new plaintiffs against Iran and parties that wish to join the
9 Ashton complaint against Saudi Arabia.

10 I don't know whether or not there are any issues that
11 the Defendants' Executive Committee wants to be heard on this
12 particular issue, and I don't believe anybody from the
13 Defendants' Executive Committee is here, so maybe that issue is
14 best tabled since they may have a view, but I want to discuss
15 it at least in part.

16 Why don't I ask Mr. Kellogg to begin by just telling
17 us where you view things. I know you just returned back from
18 Saudi Arabia and you have done some investigation, so why don't
19 you tell me, from your perspective, where things stand and what
20 you think you can be able to produce and when.

21 MR. KELLOGG: Thank you, your Honor.

22 We just spent a week, a little over a week in Saudi
23 Arabia. We saw a number of agencies and individuals to begin
24 the process of gathering documents. So far, what we have been
25 mainly focused on is understanding where repositories of

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1 documents might be held. We are getting, sort of, charts from
2 the various agencies we talked to.

3 We went to the General Authority on Civil Aviation,
4 which was the successor of the PCA, which is where Omar Bayoumi
5 worked for 20 years before he went to the United States and
6 where he returned to after and recently retired from.

7 We went to the Ministry of Islamic Affairs, where both
8 Fahad al Thumairy and Khalid al Suwailem, who were the focus of
9 their document requests, worked.

10 We are in the process, we are going to go back at the
11 end of the month, after the Ramadan and the post Ramadan
12 holiday, which complicates our discovery, in order to gather
13 relevant documents for the court, for the plaintiffs.

14 THE COURT: So your mission in Saudi Arabia was an
15 investigatory one but not a fact-gathering one or a
16 document-gathering one? Is that a fair assessment?

17 MR. KELLOGG: Well, we gathered some of the
18 low-hanging fruit, like the complete personnel file of Omar
19 Bayoumi. We gathered materials that they had on hand about
20 Mr. al Thumairy.

21 But really, you know, we have to determine whether
22 they -- what kind of records they kept in 2000, the e-mail
23 versus payment records and electronic files and what they might
24 have in terms of --

25 THE COURT: What can you tell us about that particular

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1 issue? Is it an electronic document or is this a paper-heavy
2 file.

3 MR. KELLOGG: It is pretty clearly not going to be a
4 lot of electronic stuff, if any. We are talking about 20 years
5 ago. So far as we could tell, none of the agencies that we
6 have talked to were using e-mail at that time. Even the
7 embassies were using faxes and cables back and forth, rather
8 than electronic media. So we are going to check in detail to
9 see if there are any electronic files or backup files, but we
10 don't really expect a volume of that.

11 So mostly what we are dealing with is paper, and Saudi
12 Arabia is not a heavily papered society. In other words, they
13 don't document things the way a corporation in the United
14 States would in 2018. So we are going to have to dig deep to
15 try to get everything that would be responsive.

16 THE COURT: When we were last here four weeks ago, six
17 weeks ago, you had a very ambitious schedule.

18 MR. KELLOGG: We did.

19 THE COURT: How do you feel about that schedule now?

20 MR. KELLOGG: I feel chastened about that schedule.
21 It is a cumbersome process, and of course we need Arabic
22 speaking individuals with us, not only to do the interviews,
23 but then to examine documents to decide whether things are
24 responsive. And we are going to have to collect those and then
25 bring them back and arrange for translations for our own

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1 purposes so we know exactly what is responsive, and then
2 produce them and turn them over.

3 I think more realistically we are talking about the
4 end of summer before we can finish substantial document
5 production, but we intend to do rolling productions along the
6 way, as we get documents. And much will depend -- and,
7 frankly, the guidance we are going to need the most from the
8 court today is the repositories we should be searching. We set
9 our list of repositories based on Judge Daniels' opinion pages
10 19 to 23, ones who are mentioned either by Judge Daniels or any
11 allegations that he cited in that portion of the opinion. They
12 are the places where the relevant actors worked or visited or
13 were otherwise involved in. That was the GACA, the General
14 Authority of Civil Aviation. It was the Ministry of Islamic
15 Affairs, which plaintiffs claim that a senior official of
16 theirs charged Thumairy and Bayoumi of aiding the hijackers.
17 Those are the two main agencies in Saudi Arabia that we have
18 looked at.

19 In the United States, we have gone to the embassy in
20 Washington, we have gone to the consulate in Saudi Arabia, and
21 we have gone to what's called the Saudi Arabia Cultural
22 Ministry, which is now in Fairfax, Virginia, to look for
23 educational records there that they might have.

24 So those are the five places that we focused on.
25 Plaintiffs have suggested 11 additional potential repositories,

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1 and I would love to talk about each of those in turn, because
2 we think it would substantially increase the burden without any
3 real likelihood of producing responsive documents, particularly
4 since none of these agencies are dealt with or the allegations
5 about them are dealt with in pages 19 to 23 of Judge Daniels'
6 opinion. I can run through those very quickly if they would be
7 helpful to the court.

8 THE COURT: It may be helpful at a later moment, but I
9 don't think I need you to do that right now.

10 So I understand what you are contemplating, and I see
11 in your letter you indicate that you think you will be able to
12 respond at least in part to, you say, 79 of the 101 requests
13 for production and 15 of the 18 interrogatories. In stating
14 that, is it correct to understand that you are going to be
15 gathering documents from these four or five entities' you
16 indicate, five entities' you indicate repositories, as you
17 describe them, and then searching for responsive documents to
18 those discovery demands? Is that what you are contemplating?

19 MR. KELLOGG: Yes, your Honor.

20 THE COURT: Let me ask you to speak generally about
21 dates, if you wouldn't mind. I understand that there is large
22 agreement between the parties about dates, though I also
23 understand that the plaintiffs are seeking at least some
24 earlier documents with respect to, I believe, al Bayoumi and,
25 more generally speaking, documents that post date September 11.

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MR. KELLOGG: Correct, your Honor.

The plaintiffs, in their document requests and interrogatories, generally set a date range from January 1 of 1998 to 9/11/01, and we had no problem with that, although Judge Daniels' opinion focused on early 2000. We thought it was fair that they were asking for some context about the second move and such of how Bayoumi and al Thumairy ended up at the King Fahd Mosque and at the L.A. consulate. So we agreed to those date ranges.

A number of them ask for materials even further back, to 1994, 1995, particularly for al Bayoumi. After our meet-and-confer, we sent an e-mail saying we would search for those. I listed the document requests in which they asked for earlier documents and said we would respond to those.

The post-9/11 documents, pose two issues:

One, the most what it is asking for, which is like travel records, compensation, entry and exit visa information, etc., there is a whole series which we layed out in our letter of the specific document requests, in our view will not throw light on what Judge Daniels said was the question, which is, what happened in early 2000 and whether somebody traveled or where they traveled and what kind of visas they got and other such materials don't seem to be particularly relevant. So that's one set.

But they are also asking for any investigations that

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1 Saudi Arabia itself performed into the 9/11 attacks as well as
2 materials shared with the 9/11 Commission and such, and we feel
3 that those are problematic in a couple of respects. One, to
4 the extent that they are showing an investigation by what would
5 be the Presidency of State Security, which includes the entity
6 that they called the Mabahith, which is responsible, like our
7 F.B.I., for internal state issues and security issues and
8 criminal issues. To the extent that they conducted an
9 investigation, we think that their theories, reactions,
10 impressions, etc., are not properly within the scope of what
11 Judge Daniels has requested. They are also, under Saudi law,
12 classified and potentially, to the extent that we were sharing
13 materials with the F.B.I. or with the 9/11 Commission, it was
14 the understanding of both parties that the materials shared
15 back and forth were to be confidential.

16 So to the extent the -- the 9/11 Commission has
17 produced, I believe, a tremendous amount of material, posted it
18 on the Web. To the extent that they have withheld certain
19 materials, we don't think it is appropriate for the plaintiffs
20 to come and try to get it sort of through the back door through
21 us, and that it would be inconsistent with our agreements with
22 the U.S. investigators.

23 THE COURT: Let me ask you a question with respect to
24 the dates. If this were a less charged court action you could
25 envision communications and documents that post date the

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1 accident as being relevant and probative because it might
2 indicate state of mind, knowledge, oh my gosh, I can't believe
3 this Cuisinart actually exploded in the kitchen. We thought it
4 might those kind of *post hoc* communications by people with
5 knowledge that would be discoverable in an ordinary tort case.

6 And so my reaction generally to the date range issue
7 is that it doesn't seem reasonable to make 9/11 the cutoff
8 date, at least for all matters, because to the extent there are
9 relevant communications -- let's get Bayoumi and al Thumairy
10 out of the country quickly because of what they just
11 orchestrated, for example -- that they should be entitled to
12 those documents. So I see that as different than the category
13 of documents that were either an internal investigation that
14 the Kingdom conducted or documents that were provided to
15 various intelligence agencies, including the F.B.I. or the CIA
16 or the 9/11 Commission.

17 But generally speaking, if you are searching for
18 communications between or about these two individuals, let's
19 say that the Ministry of Islamic Affairs might have, it seems
20 to me that there should be some dates, some searching,
21 postdating 9/11.

22 MR. KELLOGG: Understood, your Honor.

23 You know, this is not an ordinary 26(b)(1) case, and
24 Judge Daniels did focus very much on whether instructions were
25 given at a specific time and communications regarding those,

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1 and we think the most relevant materials are contemporaneous
2 documents. If the court wants us -- as I said, most of what
3 they are asking for post 9/11 falls into two categories. One
4 category is just the same stuff they were looking for pre-9/11
5 of communications with Thumairy, communications with Bayoumi,
6 travel information, exit visa information. We could gather
7 that. Of course we don't think it is within the scope, but we
8 could gather that in the ordinary course. We have a bigger
9 concern with investigative and intelligence materials which
10 they also request.

11 THE COURT: Okay. I am going to come back to you, but
12 let me turn to the plaintiffs for a minute.

13 Mr. Carter, you are in the hot seat, so I assume you
14 will be taking the lead here.

15 MR. CARTER: I am, your Honor. I will kick us off and
16 Mr. Pounian may very well have some things to add on certain
17 subjects.

18 THE COURT: Okay.

19 So you heard from Mr. Kellogg that you will be
20 receiving documents from at least these five repositories. I
21 think you heard me that I am inclined to order that we go past
22 9/11 as a cutoff for searching ordinary internal
23 communications, e-mails, memos, etc. Talk to me about -- why
24 don't I tell you what I am thinking about, and then maybe you
25 can tell me what you think.

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1 MR. CARTER: Sure.

2 THE COURT: Judge Daniels identified very specific,
3 tailored allegations that the plaintiffs have put forward
4 establishing the jurisdiction over Saudi Arabia. I had
5 reviewed your discovery demands, and I think they are, in large
6 measure, beyond the scope of what he has authorized. It may be
7 that ultimately the court's conclusion is that the case should
8 go forward with the merits discovery, in which case the types
9 of demands that you are seeking may in fact be appropriate, but
10 at this stage I do think they are beyond what is contemplated
11 by his decision or what I contemplated when we were together in
12 April.

13 What I am contemplating right now is that you obtain
14 as quickly as possible -- and Mr. Kellogg says the end of the
15 summer, but I'm hoping we can move that date up some -- and
16 that you review those documents and see what you learn before
17 you make an application to compel the response to any number of
18 discovery demands that you have propounded at this point, given
19 that my sense, since it wasn't in the complaint or the
20 decision, is that those paths of discovery are ones that you
21 think may be lucrative, but don't have a firm foundation for
22 pursuing, and that the better course may be for you to see
23 what you learn, and if there is something in the batch that I
24 think we can all agree is an appropriate batch of discovery,
25 you can then make an application to the court to compel

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1 responses.

2 MR. CARTER: Your Honor, we had a slightly different
3 approach in mind, although the one your Honor has proposed may
4 very well work.

5 Our view on this was that the principal issue,
6 overarching issue at this point is how is Saudi Arabia going to
7 go about collecting documents and information? And your Honor
8 had mentioned that Mr. Kellogg had referenced searching and
9 producing documents from five repositories. In fact, what we
10 have is an agreement on their part to search through five
11 repositories, three of which may be subject to very broad
12 assertions of privilege under the two Vienna Conventions,
13 pursuant to which the Kingdom has said it is not permitting
14 providing any of the documents or the information learned and
15 that it may not even be willing to provide a privilege log.

16 Our view, in terms of how this should proceed, is
17 relatively simple. The Supreme Court held in its *Republic of*
18 *Argentina v. NML Capital* decision that where discovery is
19 proceeding under the FSIA, the normal rules of discovery under
20 the federal rules apply to the discovery that has been
21 authorized. From that flow a couple of very simple, basic
22 principles, in our view.

23 First, under Rule 34, a party who is engaged in
24 discovery has an obligation to produce documents in its care,
25 custody, and control if they are relevant and unless they are

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1 privileged. So we think application of that basic rule here is
2 appropriate, that the Kingdom should be obligated to do what
3 any litigant in federal court subject to discovery would be
4 obligated to do consistent with the Supreme Court's holding and
5 look in the places where the documents are located.

6 Now, we have asked a very simple interrogatory on that
7 front that asked the Kingdom to identify repositories where
8 documents related to Bayoumi and Thumairy are located. We
9 believe that they already have that information. So we think
10 it is all the more important that they have a search that
11 captures all of the repositories, given the way that they have
12 articulated their privileges. We may not be getting anything
13 from three of the places they are talking about searching; and,
14 to the extent documents from those places were sent, for
15 instance, to the Foreign Ministry or somewhere else, the
16 privilege that attached to archives and consular or diplomatic
17 properties may have been waived. So that's the first
18 principle.

19 The second is simply, with regard to the
20 interrogatories --

21 THE COURT: I want to interrupt you so I understand.
22 So you think that, in response to that interrogatory, the
23 kingdom would respond that documents related to these two
24 individuals would be located in repositories outside of the six
25 that they have agreed to search.

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1 MR. CARTER: I think we are relatively certain that
2 that would be the case from what we know. We have identified
3 in our letter certain contacts that occurred with other
4 ministries. We know that senior people from the Ministry of
5 Defense and Aviation, which is the parent of now the GACA, what
6 was the Presidency of Civil Aviation were involved in Bayoumi's
7 secondment, and so it stands to reason that there may very well
8 be documents in the parent ministry that aren't resident in the
9 Presidency of Civil Aviation. And, again, this is simply a
10 matter of adhering to the normal approach under the rules as to
11 the scope of a document collection effort. We think that they
12 likely already know where all of the documents are and can
13 provide them to us.

14 THE COURT: What you are saying now I think is
15 slightly different than what you propounded in your discovery
16 demand, which was unusual. If you believe there is a clear
17 chain of litigation that you can point to about particular
18 secondment that had to go to the Ministry of Finance or some
19 other agency for approval or for signoff, or for whatever it
20 is, it seems to me that that can be a very tailored discovery
21 demand.

22 But I think, generally speaking, the broad discovery
23 demands that you have propounded and saying look at every
24 agency that could ever have any possible touch to the 9/11
25 attacks is overbroad and is not what was contemplated by

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1 Judge Daniels.

2 So I hear you that you are saying we have very strong
3 reason to believe that this particular memo had to go to this
4 particular agency in order for Bayoumi's secondment to happen,
5 for example. That seems different to me than saying the
6 Kingdom needs to search its entire filing system to search for
7 a needle in a haystack.

8 MR. CARTER: Well, your Honor, just take, for example,
9 our request that The kingdom search the Mabahith. Mr. Kellogg
10 had suggested today that it is an intelligence agency, the
11 equivalent the F.B.I., and therefore everything categorically
12 that might come out of it would be privileged in their view.
13 Our view that in the course of the Kingdom's own
14 investigations, certain original documents would have all
15 gotten transported over there and that this is one-stop
16 shopping for most virtually everything that we are entitled to
17 and would want. There may very well be assessments, analyses
18 that occurred after 9/11 that would validly be privileged. But
19 with respect to the stuff that was identified and collected for
20 purposes of determining specifically what Bayoumi and Thumairy
21 were doing, who may have been directing them, that is an
22 appropriate place for them to be searching and it really -- the
23 exercise that they have gone through previously is the one that
24 the federal rules contemplates, to look around, gather the
25 documents, gather the information, and put it in a central

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1 place. And to the extent that's already been done, we think
2 that that's the first place that the Kingdom should begin
3 searching, especially given the potential that the other
4 repositories are going to essentially be or potentially be
5 regarded by the Kingdom to be off limits.

6 And so we are happy to make a showing, your Honor, as
7 to why we think particular repositories should be searched at
8 the outset of this. We obviously could not have canvased those
9 issues, as your Honor surmised, in a ten-page letter brief on
10 the status. And so we are happy to do that up front and
11 explain legally our position about how the federal rules should
12 operate in the context of this and why we think these are
13 appropriate places for them to be looking.

14 THE COURT: Mr. Kellogg, if it is correct that this
15 agency -- what's the name of the agency you describe as like
16 our F.B.I.

17 MR. CARTER: It's the Mabahith.

18 MR. KELLOGG: No. It is the Presidency of State
19 Security, your Honor. There are only two agencies. There is
20 the Presidency of State Securities, which is the equivalent of
21 the F.B.I., and what Mr. Carter calls the Mabahith is contained
22 within that. There is also the GID, General Intelligence
23 Directive, which is their equivalent of the CIA, and Mukhabarat
24 is contained -- what they are what they are calling Mukhabarat
25 is contained within that.

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1 THE COURT: If there were documents that the
2 Presidency of State Security gathered from various other
3 agencies, Islamic Affairs, etc., agencies that you have said we
4 are prepared to search, if it is true that, following the
5 September 11 attacks, this particular agency, this intelligence
6 agency went around to the various agencies that it thought
7 might have information and physically grabbed paper documents
8 for the purposes of its investigation, originals, faxes from
9 the year 2000, grabbed them for purposes of its own
10 investigation, would it be your position that those documents
11 would be otherwise off limits because they were part of the
12 documents that you were using for investigation or would you be
13 prepared to search that collection, which has already been
14 gathered, without necessarily even revealing whether they were
15 part of the investigation gathering or not, but simply as an
16 original document that would be responsive to the discovery
17 demands?

18 MR. KELLOGG: Absolutely, your Honor. In fact, we
19 have begun that process. We had a lengthy meeting with
20 Presidency of State Security. We think the plaintiffs'
21 assumption that a large investigation was done and materials
22 were gathered is mistaken; but, to the extent that any
23 materials were gathered, original materials from the various
24 agencies we are searching or otherwise, we would be prepared to
25 work with the Presidency of State Security to turn those over.

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1 THE COURT: So you are prepared, you identified five
2 repositories, but I think I hear you saying you are prepared to
3 also review that collection of material, which I am
4 interpreting as different than that agency's own investigative
5 files, its own original work that it is creating, but you would
6 search the file cabinet, as it were, of documents that it
7 seized from other agencies and that it reviewed as part of its
8 own internal investigation.

9 MR. KELLOGG: Correct, your Honor. To the extent
10 that, say, PSS received documents from the Ministry of Islamic
11 Affairs or from GACA, and those files are no longer with those
12 agencies because they took the originals, then absolutely we
13 believe we should turn those over.

14 THE COURT: Okay. And would you commit to turning
15 over any responsive document that is in that intelligence
16 gathering set of documents, even if it is not from the five
17 repositories that you identified? So let's say some other
18 ministry, the Ministry of Finance, also had relevant documents
19 that, when the Presidency of State Security opened its own
20 internal investigation, for whatever reason, its catchment of
21 documents was broader, it brought everything under its own
22 house and then now, in reviewing those documents, if you see
23 documents that are responsive to the discovery demands, but
24 maybe don't come from those five identified repositories, do
25 you commit to turning that over as well?

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1 MR. KELLOGG: Yes, your Honor, subject -- it's a
2 hypothetical because, based on our discussions with them, we
3 think their role was mainly cooperating with the United States
4 and supporting the United States's investigation, rather than
5 doing any extensive investigation of their own. But to the
6 extent that they gathered responsive documents from the
7 relevant periods, then we would commit to searching for those
8 documents.

9 THE COURT: Okay.

10 MR. KELLOGG: Subject to any kind of, you know --
11 there may be some sources and methods issues that come up that
12 require redaction or otherwise, but we do anticipate doing
13 that.

14 And with respect to the diplomatic documents, we
15 talked about the embassy, we talked about the consulate. We
16 met personally with the Minister of Foreign Affairs, and he
17 made it quite clear that they are prepared to turn over
18 relevant documents. They don't want, you know, a general
19 rummaging in their diplomatic files, but the sort of targeted,
20 focused gathering of documents we do not anticipate -- this
21 could change, I'm saying based on our discussions, we do not
22 anticipate that they will be claiming diplomatic privilege for
23 those.

24 THE COURT: Okay.

25 MR. KELLOGG: But we did have to, in the letter,

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1 preserve all our rights and privileges, otherwise they would
2 say we waived them.

3 THE COURT: Understood. Thank you.

4 Mr. Carter, I was with you, but I wanted to get some
5 clarity. So now we have a little bit, I think, better sense.

6 So not only is the Kingdom committing to search these
7 five repositories independently, it is also committing to doing
8 exactly what you wanted, which is, in the weeks and months
9 after 9/11, to the extent Saudi Arabia conducted its own
10 investigation, either for its internal purposes or for purposes
11 of cooperating with any foreign agency, and it is holding those
12 documents in a particular place, that it will also search those
13 documents.

14 So if they lifted a personnel file from where it
15 should be and brought it into this intelligence agency, it
16 would not be protected, and they would search for it and
17 produce it unless there was some other independent ground, but
18 the fact that it was housed in the intelligence agency
19 wouldn't, in and of itself, make it nondiscoverable.

20 MR. CARTER: That's what I understood as well, your
21 Honor.

22 THE COURT: Okay.

23 MR. CARTER: There obviously are, as your Honor
24 alluded, some very specific cases with regard to the approval
25 of Bayoumi's secondment, for instance, with regard to certain

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1 financial transfers where we have a very specific reason for a
2 very specific issue that we believe a particular ministry would
3 have a document and we would like to have an opportunity to
4 make that showing with respect to those entities.

5 THE COURT: Do you believe that the discovery demands
6 that you already served are narrow and targeted in that
7 particular way or are they broad in your mind and would capture
8 the specific thing you are seeking but you wanted whatever else
9 would come along as well?

10 MR. CARTER: I think that they likely would have --
11 some of them would have to be clarified in a way that says:
12 With respect to this particular request, we are asking
13 specifically for this ministry because we have the following
14 information to suggest that there are documents there.

15 THE COURT: Okay. I think that that would be a
16 helpful thing. So you can review discovery demands. If there
17 is something outside of what we have been discussing here,
18 maybe something from, I'm going to keep using the Ministry of
19 Finance, that you have a particular reason to believe is going
20 to be relevant to explain that, so that we can have a targeted
21 search and so they can respond more specifically to what the
22 request is.

23 MR. CARTER: Thank you, your Honor.

24 We also do believe that the General Intelligence
25 Directorate is the repository that would house documents

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1 relating to the activities of Thumairy and Bayoumi that are
2 described in the court's March 28 decision; and, in fact, we
3 put affidavits in the record that the intelligence agency would
4 have been a secondary customer of the activities that Bayoumi
5 and Thumairy were engaged in, and so we have evidence as well
6 that Thumairy was in fact involved in supervising people who
7 were engaged in intelligence-gathering activities, and so it
8 naturally follows that there would have been reporting to that
9 agency relating to what Bayoumi and Thumairy are doing.

10 The Kingdom's response to that is to say, That's our
11 CIA, and therefore everything that could possibly come out of
12 that would be a state secret. That kind of blanket assertion
13 of a privilege based on state secrets doesn't comport with the
14 federal rules and it is not even something that the CIA or
15 F.B.I. could do if they were litigating a discovery dispute in
16 U.S. courts. There is a very specific showing. They have to
17 come forth. They can't simply say, We are an intelligence
18 agency, so anything in our files necessarily becomes a state
19 secret. Actually they have to bring forward the head of the
20 agency to personally invoke the privilege, to say that he or
21 she has given it personal consideration, and that it is
22 necessary to hold the documents back. So the mere fact that we
23 are talking about an intelligence agency doesn't foreclose the
24 possibility that there are documents there that we are entitled
25 to. We candidly question whether or not the states secret

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1 privilege is available to Saudi Arabia in these proceedings.
2 What we would simply like to do is to ensure that that
3 repository is searched.

4 When we spoke on the phone with Mr. Kellogg, we asked
5 specifically, with regard to your common law privileges, state
6 secret deliberative process, would you provide a privilege log,
7 and the answer at that time was yes. So that's all we are
8 expecting here. If they have valid assertions of privilege,
9 they will provide us with a privilege log, and we can go
10 forward from there. But we do believe that there are documents
11 in that repository that are highly relevant here.

12 THE COURT: Mr. Kellogg, have you spoken with the
13 folks from the General Directorate?

14 MR. KELLOGG: We have not spoken with anyone from the
15 General Intelligence Directorate, your Honor, nor do we think
16 that plaintiffs have made even remotely a showing that that
17 agency is likely to have relevant documents that have anything
18 to do with the allegations within pages 19 to 23 of Judge
19 Daniels' opinion. The only thing they cite in their letter as
20 a basis for a broad search of effectively the CIA is that they
21 say that the F.B.I. had, quote, strong suspicions that Bayoumi
22 was a Mukhabarat agent. In fact, the F.B.I. expressly rejected
23 that in their 2005 joint report with the CIA. And plaintiffs
24 did not argue in the recent round of pleadings that Bayoumi was
25 an intelligence agent, and Judge Daniels did not rely on any

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1 such allegation. So there is, accordingly, no basis, no basis
2 under Judge Daniels' opinion to do a search of the GID,
3 particularly given all the sensitivities to a foreign sovereign
4 and their intelligence agency. The CIA would never allow a
5 foreign government to search into its files or prepare
6 privilege logs after doing so, and we are really not in a
7 position to go to the GID and say, We want to take a look
8 through your files.

9 THE COURT: Okay.

10 MR. POUNIAN: Your Honor, may I be heard on one thing?
11 Mr. Kellogg said there was no evidence in the record about
12 Mr. Bayoumi being an intelligence agent. On the motion record,
13 we submitted an affidavit from the head of the PENTTBOM
14 investigation, the official 9/11 investigation, who was the
15 head of the team in Los Angeles, and he said that they found
16 substantial evidence that Mr. Bayoumi was a Saudi intelligence
17 agent. So that is something that is in the record, that was in
18 the record before the court, and is an allegation that we have
19 made with the court, and I just wanted to correct that
20 statement.

21 THE COURT: What I was proposing, and this is a good
22 example of my concern, is given the sensitivity to this agency
23 and the likelihood that a lot of information is appropriately
24 protected by privilege, it seems to me that the better course
25 here is for you to get the underlying documents relating to

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1 al Bayoumi, the types of communications that were going on; and
2 to the extent there is something in that record, some actual
3 evidence, contemporaneous evidence that you could then bring
4 back to the court and say, Look, here is communication, here is
5 a memo, here is some specific document. But the fact that the
6 9/11 Commission or some agent said that, We had suspicions or
7 we thought this or we made this conclusion, that's not
8 evidence. So it seems to me that you should have access to the
9 types of documents that would be able to help the court draw
10 that conclusion. I can't rely on the conclusion of others.

11 MR. POUNIAN: I understand that. I understand what
12 you are saying, your Honor, but they have to assert the
13 privilege in a certain way. They have to say where they have
14 the documents, and we are entitled to investigate this. And
15 under JASTA, we are supposed to be allowed full access for this
16 type of discovery. The JASTA action is specifically geared to
17 this type of activity occurring by a foreign state taking this
18 action in the United States. We are kind of blazing a new
19 trail here for the first time, your Honor, in this
20 circumstance, and I think that it is a critical issue. If the
21 foreign government is sending an agent here who is authorized
22 to provide a support network for al Qaeda inside the United
23 States, that is something I think this court is entitled to
24 allow discovery on.

25 THE COURT: But that's just your argument. The Saudi

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1 government isn't saying that --

2 MR. POUNIAN: I understand. But we have presented
3 proof -- it is argument, your Honor, but we have presented
4 proof from the PENTTBOM investigation that they did assemble
5 evidence of this. You know, we are not -- we don't have access
6 to all of those details, but we have presented evidence in the
7 motion record regarding that.

8 THE COURT: Okay.

9 MR. CARTER: Your Honor, could I make a practical
10 suggestion on this point?

11 THE COURT: Sure.

12 MR. CARTER: We don't really see any problem simply
13 having Mr. Kellogg ask the General Intelligence Directorate
14 whether it has documents relating to Bayoumi and Thumairy
15 dating to the period '98 through 2001, and we will get an
16 answer to that question. I'm sure they have the capabilities
17 of simply saying yes or no. I'm sure they know the people they
18 have documents about. And once we know whether or not the
19 documents exist, which is the point of the interrogatory we
20 asked, we can take the next step to see whether or not it makes
21 sense to go down that road.

22 THE COURT: My guess -- I'm happy to hear Mr. Kellogg
23 clog before I predict what he is going to say. Mr. Kellogg,
24 are you planning to answer this interrogatory?

25 MR. KELLOGG: I'm sorry your Honor?

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1 THE COURT: Are you planning on answering this
2 interrogatory?

3 MR. KELLOGG: We are planning on answering the
4 interrogatories.

5 THE COURT: The specific interrogatory as to whether
6 or not --

7 MR. KELLOGG: Just --

8 THE COURT: -- whether or not --

9 MR. KELLOGG: About repositories, we are going to
10 answer them based on the places we have undertaken to search.

11 THE COURT: I think what Mr. Carter is proposing is
12 that you answer an interrogatory as to whether or not the
13 General Intelligence Directorate has documents related
14 to al Bayoumi or whether he was an agent of that agency.

15 MR. KELLOGG: And our suggestion is that they haven't
16 made a proper showing that would justify that sort of inquiry
17 into the intelligence agency of a foreign sovereign. The
18 evidence that they are referring to is speculation that when
19 Bayoumi went to the L.A. consulate allegedly to get his
20 passport renewed, he was in fact engaging in spycraft to
21 disguise the fact that he was an intelligence agent. That is
22 not evidence. It is not a sufficient basis. Judge Daniels did
23 not rely upon it in 19 to 23, and I think it would be a
24 significant affront to a foreign government. Certainly the CIA
25 would not answer such a question. They always refuse to

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1 confirm or deny, because denial means -- implies confirmation
2 when they don't deny. So I think it would put us in a very
3 awkward position, your Honor, and I think that they haven't
4 made a sufficient showing to request that.

5 THE COURT: Okay.

6 MR. CARTER: Your Honor, on that point, I think
7 simply, if that's the Kingdom's position, that they can't be
8 obligated to look or do something, that statement needs to come
9 from an official of the Kingdom, as opposed to just a
10 representation by counsel. That is the way it would work if
11 the CIA were in a discovery proceeding and were telling the
12 court, We can't tell you this, because it would itself
13 implicate a state secret, the head of the agency would come
14 forward, invoke the privilege, say that he or she has given it
15 personal consideration, and it would flow under the rules that
16 apply to asserting that privilege. It is a relatively straight
17 forward question.

18 THE COURT: Okay.

19 Mr. Kellogg, I want you to do better than the end of
20 summer for this what I'm going to call a first tranche of
21 production. I would like to get these documents to the
22 plaintiffs by July 31. That gives you a little over two
23 months, which I think should be enough time.

24 MR. KELLOGG: And as I said, we will do rolling
25 production. We have personnel files already, and we just want

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1 to make sure that they are complete, and we will endeavor to
2 do, and I would love to have it done by July 31, your Honor.
3 It is just logistically, there are some issues, but we will do
4 our best.

5 THE COURT: Okay. And where appropriate, I want you
6 to look through December 31, 2002. So that gives us a little
7 bit over a year past 9/11. And I want you to look through the
8 repositories that you have agreed to look through as well as
9 the Presidency of State Security file, to the extent that they
10 assembled documents for their purposes whether for their own
11 internal investigation or for purposes of sharing information
12 with other intelligence agencies.

13 I am not going to direct that you respond to the
14 interrogatory or search the General Intelligence Directorate,
15 but that is a ruling without prejudice. I want you,
16 Mr. Carter, and your colleagues to look through the documents
17 you that receive, and then we are going to set up an
18 opportunity for proper motion practice, where you can put
19 forward to me what documents you believe you are now further
20 entitled to in light of the first tranche of production. But
21 what I want you to get is sort of the core documents that we
22 are talking about here, so everything related to these two
23 individuals' employment, the secondment, their communications
24 with the various consulates, their sort of role with the
25 various -- with the aviation agency. Obviously you are getting

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1 whatever you are getting from Dallah Avco. I am pretty sure I
2 have a pending motion to compel on that front, so maybe you
3 don't have that much from them, but I want to do this in a
4 tranced and phased way, because I think we will have a better
5 sense of what is there, and it may be that the discovery
6 indicates that there really is a good-faith basis to expand
7 much more broadly the scope of discovery.

8 So, Mr. Kellogg, you should advise your client that is
9 this is not the end of it, this is our first phase, and then we
10 will see what we have.

11 I think we should have, and I'm going to leave it to
12 the parties to agree on exactly what it looks like, but a
13 privilege log should be produced. I don't have a sense yet,
14 given the agencies that we are looking at, what privilege is
15 going to be asserted and whether or not it is the type of thing
16 where we can do categories. So, in the first instance, I'm
17 going to look to the parties to try and coordinate and
18 cooperate on that front. If there are categories that give the
19 plaintiffs adequate understanding of what is actually
20 encompassed in those categories, that may be sufficient for
21 purposes of asserting a privilege, but obviously your
22 categories have to be meaningful, meaning they can't just be,
23 Privileged documents are in this category, and we are asserting
24 a privilege.

25 So let's do that. It's going to be a rolling

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1 production on July 31.

2 I think, then, what I would like to do is give the
3 parties an opportunity to have a review of the documents and a
4 meet-and-confer and then see whether or not you can resolve any
5 of those disputes on your own and agree to expand or search for
6 additional discovery.

7 Let me just pause for one moment.

8 Mr. Kellogg, in addition to the general discovery
9 demands, the plaintiffs are going to give you more targeted
10 discovery which may be slightly beyond what I am directing
11 today, so it might be a different agency, but it should be
12 targeted.

13 And, Mr. Carter, you should be candid and clear about
14 what it is you are seeking and why, to give Mr. Kellogg and his
15 team as much information to do as meaningful a search as
16 possible.

17 MR. CARTER: Sure, your Honor.

18 THE COURT: I am thinking that mid September would be
19 an adequate amount of time for you to receive these
20 documents -- I don't know if we are going to have translation
21 issues, which is going to cause complications. Obviously there
22 is going to be translation done in the first instance. Are the
23 parties agreeing to share translators? Is that something that
24 we can do?

25 MR. CARTER: Your Honor, there was provision in, I

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1 believe, the case management order number two, going back to
2 2003, that essentially required the parties to share existing
3 translations of documents, but not share translations that were
4 done during the course of the litigation, for purposes of the
5 litigation.

6 THE COURT: Can we revisit that topic? Is it
7 possible? Look. If Mr. Kellogg and his team are getting a
8 bunch of documents in Arabic, they are then hiring a translator
9 to translate them so that they can do a review and determine
10 whether they are responsive or privileged, then to turn over
11 the Arabic versions, and for you to then hire your own
12 interpreter seems problematic. It delays the process, it is
13 more expensive, and I would hate for there to be sort of a
14 battle of the interpreters, as well.

15 Is it possible that the parties could agree on a
16 neutral interpreter who could review this? And now that I am
17 thinking out loud, there are going to be issues, I assume,
18 about privilege that you may have problems with.

19 MR. KELLOGG: Well, there are, your Honor. And,
20 frankly, we were planning to do initially a fairly quick and
21 dirty and perhaps even machine translation in order for us to
22 determine whether the documents are generally responsive,
23 whether there is a privilege issue as well, and there will
24 probably be only a subset down the road that we get a certified
25 translator to do. And there will inevitably translation

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1 issues, where dueling translators say, no, this means X, Y, and
2 Z and somebody else says, no, it means A, B, and C. I suspect
3 it won't be possible for us to come to an agreement on that.

4 THE COURT: Do you intend to produce your translated
5 version along with your --

6 MR. KELLOGG: No, your Honor.

7 THE COURT: -- Arabic version?

8 MR. KELLOGG: No. We just plan to produce the Arabic
9 version.

10 THE COURT: So is it possible that we are going to
11 have motion practice, whenever we have it, where I have dueling
12 English versions of the same document?

13 MR. KELLOGG: My understanding is, your Honor -- I
14 have never done a case like this before, but my understanding
15 is that there are dueling translators even in depositions who
16 argue over whether the, you know, question has been interpreted
17 properly to the deponents and whether the deponent's answer has
18 been interpreted properly back. I am afraid it is something of
19 a mess that can't be avoided.

20 THE COURT: Okay. Let's just pause on the idea that
21 we can try to avoid it and maybe you can speak. It seems to me
22 that there could be, in theory, an agreement that the ABC
23 Corporation, which does excellent translation for high-level
24 corporations and government agencies, could be the translation
25 company that both sides agree to, and that you agree to use the

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1 same company for depositions, for document translations. It
2 seems to me that rather than have this, at least in the first
3 instance, rather than create an unnecessary dispute, to say
4 nothing about time delays and costs, that this might be a way
5 to move the case along. And it could be without prejudice to
6 each side at a later date saying we are actually challenging
7 the designated interpreter because we have taken this
8 particularly important document to another interpreter, and
9 that interpreter says it is something else. But for your
10 ordinary course of documents, where there is not going to be a
11 whole lot of dispute about what is being reported, it seems to
12 me you can save a lot of heartache by sharing interpreters.

13 MR. KELLOGG: I am happy to discuss that with
14 Mr. Carter, subject to the caveat you mentioned, which is,
15 either side is free to dispute the agreed-upon translation.

16 THE COURT: I would never let a lawyer not make an
17 argument.

18 MR. CARTER: I am happy to speak with Mr. Kellogg and
19 the cast of characters on our side as well.

20 THE COURT: I think you should.

21 MR. CARTER: Sure.

22 THE COURT: I have to believe that there must be some
23 agency that we could agree upon would be adequate for this
24 purpose, and that way you can share costs. And then when
25 Mr. Kellogg's team is translating a document for purposes of

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1 discovery, you can get the translation because it is the one
2 that we all agreed upon. And, again, you would be free to
3 dispute even the translator that was agreed upon, but then we
4 don't have to delay another month to have all these documents
5 translated.

6 So I am going to throw that out there to you all, but
7 I think it is something you should seriously consider.

8 So I want documents produced on a rolling basis on the
9 documents we have agreed upon with the dates that we have been
10 discussing. Final production should be July 31.

11 There should be some form of privilege log to the
12 extent you are withholding documents on the basis of privilege.
13 In the first instance, I'm going to leave it to the parties to
14 try to work out an agreement. Again, maybe there are no
15 documents that are privileged. Maybe it is so large that
16 categories are appropriate. So, without any more information,
17 I'm going to hold off on a direction on that particular front.

18 MR. KELLOGG: Just as a clarification, your Honor. My
19 understanding is your ruling with respect to the PSS, we are
20 going to look for documents that they gathered from other
21 places and brought together, and I don't have to put a
22 privilege log of any of their impressions or notes or such,
23 like, investigative materials. It's in order to get documents
24 that say the Ministry of Islamic Affairs had --

25 THE COURT: Correct.

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1 MR. KELLOGG: And then I don't anticipate a problem.

2 THE COURT: Correct. That's correct. Okay.

3 Then what I want is for you all to spend the next 45
4 days reviewing those documents for the Plaintiffs' Executive
5 Committee to determine whether or not, based on that
6 production, you believe that they need to go back either into
7 the same repositories or whether they need to expand their
8 searches, whether there is targeted discovery that you think
9 you can identify a particular memo, for instance, that's
10 referenced, or whether or not you think the discovery
11 demonstrates that we should have a larger production, sort of
12 more akin to the types of discovery demands that you initially
13 propounded.

14 I want the parties to have a meet-and-confer on that
15 issue, and then I think probably, rather than have a status
16 letter, we should just set a deadline for motion to compel. I
17 think that's probably the most efficient process. I don't have
18 a calendar here. I will look at the calendar. But it will be
19 a mid September deadline for the motion to compel. So we will
20 set an order for that, and it will be the plaintiffs' motion to
21 compel responses or additional discovery, and your motion will
22 be most successful if you can provide me with the types of
23 evidence that justifies further inquiry.

24 I want to talk about the Kingdom's request for
25 discovery from the plaintiffs. My reaction to that is that it

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1 is not appropriate, but I am sensitive to the concern that you
2 raised about a potential sandbag. So I want to talk for one
3 moment -- I don't know if people have started thinking about
4 this -- about the end game here, which is how we are going to
5 go back to Judge Daniels.

6 I think what Judge Daniels anticipates is a renewed
7 motion to dismiss filed by the Kingdom. What I want to propose
8 is that the plaintiffs -- I'm not ready to order this, but here
9 is what I am thinking might make sense -- that the plaintiffs
10 set forth something like findings of fact in advance of the
11 motion to dismiss, setting forth the basis that the Plaintiffs
12 Executive -- I don't want an amended complaint -- nobody wants
13 an amended complaint -- but a statement on this particular
14 issue, say, findings of fact à la Rule 56.1, although that's
15 not what we are talking about here, so some version of that, so
16 a statement with supporting documents that the Kingdom can
17 review and rely upon in making its motion.

18 In theory, how does something like that sound?

19 MR. CARTER: Your Honor, in theory it sounds fine. We
20 have actually done something similar in the context of some of
21 the personal jurisdiction motions that occurred earlier in the
22 case and came forward after discovery with affirmations of
23 facts in evidence that we were going to rely upon in support of
24 our opposition to those motions. I think we have to talk about
25 the timing of all of that; but, in theory, I don't think it is

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1 a problem. We are not trying to play hide the ball. We just
2 didn't think this was the appropriate time to do this kind of
3 discovery because we are principally waiting to get the
4 information from them. But once we have it, we are perfectly
5 happy to show our cards.

6 THE COURT: Okay. That was sort of my takeaway, as
7 well.

8 Any response or reaction from the Kingdom?

9 MR. KELLOGG: No, your Honor, as long as it does not
10 delay the process too much. The plaintiffs' responded last
11 night to our discovery request, and in it they said they would
12 provide us copies of all materials that they obtained through
13 third-party subpoenas, which I think it is appropriate for us
14 to be able to see, as well, going to be important.

15 THE COURT: Okay. Good.

16 All right. As far as timing goes, I know we talked
17 about motions being filed in October. I don't think that
18 that's realistic, but I am looking to get motions or get this
19 back to Judge Daniels hopefully by the end of this year or
20 early next year. That time frame seems like a reasonable one
21 for me, and I know there are other discovery motions that are
22 pending before me. When this one comes in, I will prioritize
23 it, given the sensitivity and the timeliness issues.

24 Any other issues with respect to the discovery that we
25 should be discussing at this point?

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1 MR. KELLOGG: Your Honor, there is the issue of the
2 third-party discovery which we raised, that the third-party
3 subpoenas served on the State Department and the F.B.I. go well
4 beyond the scope of discovery that Judge Daniels has ordered.
5 I realize, your Honor, the question of whether we have standing
6 to object, and I know a representative of the United States is
7 here and presumably will be responding to that. But it does --
8 they have already served, I believe, six or seven third-party
9 subpoenas. So to the extent that they are expanding well
10 beyond what Judge Daniels talked about in pages 19 to 23 and
11 even seeking information about individuals that he expressly
12 rejected the allegations concerning as insufficient, it
13 significantly increases the burden on us and the potential for
14 delay.

15 THE COURT: How does it increase the burden on you?

16 MR. KELLOGG: Because we have to monitor all this
17 stuff as it comes in and take a look at it. To the extent that
18 there are 30(b)(6) depositions and such, we are going to have
19 to attend those.

20 THE COURT: A couple of points. One, the Plaintiffs'
21 Executive Committee is moving on multiple fronts, so it is
22 possible -- I haven't canvassed these subpoenas closely -- that
23 there is information that's being sought that may speak to
24 other elements of this much larger case.

25 MR. KELLOGG: I think that's not the case, your Honor,

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1 you will find if you read them.

2 THE COURT: Okay. And then my initial concern for you
3 is whether or not the Kingdom has standing, and I don't see the
4 argument. Your burden of having to review it seems slight in
5 this instance and it hasn't -- I suppose if the State
6 Department intends to make the same arguments that you are
7 making, that Judge Daniels has not authorized this type of
8 broad discovery, I think they are the ones who need to make
9 that argument to me. I'm not sure that you really have the
10 standing.

11 MR. KELLOGG: That's fair enough. Two points, your
12 Honor:

13 One is that we would ask that the State Department,
14 the Department of Justice, be made aware of the limitations
15 that Judge Daniels has imposed upon the discovery so they can
16 make their own judgment.

17 Second, we did cite the court a couple of opinions, I
18 know one from Judge Cote and another from the Southern
19 District, in which they note that the court has independent
20 authority to say this third-party subpoena is going beyond the
21 scope of proper discovery in this matter. So although we don't
22 contemplate filing a motion to quash and your Honor has
23 indicated you don't think we have jurisdiction, we just wanted
24 to bring the issue to the attention of the court.

25 THE COURT: Okay. Thank you.

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1 Anything you would like to say in response?

2 MR. CARTER: Your Honor, all I would say is that -- a
3 few things. One, we are obviously in a conversation with the
4 Department of Justice representing the agencies, and one of the
5 things the Department of Justice wants to know is how is this
6 relevant to an inquiry that's appropriately ongoing in the
7 proceeding? So the agencies are well represented by the
8 Department of Justice relative to the issues that Mr. Kellogg
9 has raised. We are not of a view necessarily that discovery of
10 the agencies is cabined in the same way discovery of the
11 Kingdom is; but, even putting that aside, we firmly believe
12 that the things we have asked for go straight to the heart of
13 the discussion on pages 19 to 23, and it is up to us to
14 convince the agencies and the Department of Justice that it's
15 relevant, and we are going to go through that process.

16 THE COURT: Can you represent to me that the agencies
17 are aware of the posture that the court is in, meaning that
18 Judge Daniels has issued this decision and authorized discovery
19 as to these particular allegations?

20 MR. CARTER: I can say that. Sarah Normand from the
21 U.S. Attorney's office is here. I think she could probably
22 affirm that she is very much aware of the posture of the
23 litigation, having monitored it for many, many years.

24 THE COURT: Okay. Ms. Normand, do you want to just
25 step up? But I need to you to come borrow Mr. Carter's

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1 microphone.

2 MS. NORMAND: Sarah Normand, from the U.S. Attorney's
3 Office for the Southern District of New York. And we are
4 representing both the Department of Justice and the State
5 Department in relation to the subpoenas that have been issued
6 as well as the *Touhy* requests that are accompanying those.

7 As the court may be aware, each agency has a set of
8 regulations that govern requests that are made to agencies when
9 the agencies are nonparties, and those regulations differ among
10 agencies and they outline various considerations that need to
11 be taken into account in evaluating requests.

12 And so the agencies involved in this case, the F.B.I.
13 and the Department of Justice and the State Department, are
14 reviewing the subpoenas. We have made an interim response to
15 the Plaintiffs' Executive Committees that seeks more
16 information with regard to the F.B.I. subpoena.

17 With regard to the State Department subpoena, we are
18 still reviewing that. We certainly will hear from the Kingdom
19 of Saudi Arabia with regard to its objections to understand the
20 basis for those.

21 We have very much been following this. We are here
22 today obviously, and we were here at the prior conference, as
23 well, and we are asking for information about any applicable
24 court orders that affect the scope of discovery with regard to
25 these parties; but also, to the extent the plaintiffs are

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1 seeking material that relates to other claims, if in fact they
2 are seeking that material, we have asked them to identify the
3 applicable parties' claims, court orders, etc., so we can make
4 the relevant evaluations.

5 THE COURT: Excellent. Sounds like the U.S.
6 government is well represented.

7 MS. NORMAND: Thank you, your Honor.

8 THE COURT: Thank you.

9 Let me move briefly to the request filed, I think it
10 was yesterday regarding, the short-form complaint, and the
11 like.

12 Let me ask you a really basic question. Yes? Are you
13 going to be taking the lead here?

14 MR. MALONEY: I am, your Honor.

15 THE COURT: Thank you. It is Mr. Maloney?

16 MR. MALONEY: Yes. Andrew Maloney. Sorry.

17 THE COURT: My first question for you is one maybe I
18 should know the answer to, but I will betray my ignorance in
19 open court to all, what is the statute of limitations for the
20 claims against Iran?

21 MR. MALONEY: Arguably, it's January 2, 2019.

22 THE COURT: Under JASTA because of the JASTA --

23 MR. MALONEY: Under the ATA, actually, which is the
24 Antiterrorism Act, that JASTA helped to amend.

25 THE COURT: So under JASTA --

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1 MR. MALONEY: It's JASTA and the ATA.

2 THE COURT: The ATA as amended by JASTA you believe
3 allows claims brought by January --

4 MR. MALONEY: The ATA was actually amended before that
5 on the statute of limitations. I believe it gave ten years.
6 And then JASTA came along and added to that. But I don't think
7 it -- it added some teeth to the ATA, but not on the statute of
8 limitations, but that was done to --

9 THE COURT: So I confess that I didn't look it up
10 again, but that was my recollection, that it was a ten-year
11 statute of limitations going off of 1996.

12 MR. MALONEY: No, not 1996. 2009. You may be
13 thinking of the prior FSIA, the Foreign Sovereign Immunities
14 Act, that came out in 1996 that eventually helped us with the
15 Libya action. But later, in 2009, the ATA was amended and
16 expanded -- it started the clock, reset the clock for claims
17 for another ten years from 2009.

18 THE COURT: Okay. And that amendment allowed for
19 claims that -- it allowed the clock to run anew as of 2009 for
20 an additional ten years?

21 MR. MALONEY: Yes.

22 THE COURT: It wasn't allowing a ten-year statute of
23 limitations from the moment of the tort.

24 MR. MALONEY: Correct.

25 THE COURT: Okay.

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1 So like I said, I think I should at least give an
2 opportunity for the Defendants' Executive Committee -- have you
3 spoken to them about this at all?

4 MR. MALONEY: I haven't spoken to them about the
5 application we filed yesterday. We did run by them and got
6 their essentially consent to the prior motion that we made to
7 amend the complaints. If you recall, the last time we were in
8 court, that was a pending motion that we dealt with that your
9 Honor said, rather than amending, why don't you use the short
10 form? It was a clerk docketing issue. And at the time, when
11 the court suggested that and ultimately ruled that way, I did
12 not realize, and perhaps the court did or didn't realize, that
13 the existing order to adopt by a short-form complaint, adopt
14 the existing complaints only specifically dealt with the CAC,
15 the consolidated amended complaint, that was filed against the
16 Kingdom of Saudi Arabia. Our motion that was under
17 consideration at the time asked for amending any complaint in
18 the MDL.

19 We are interested in -- we are interested in filing
20 new complaints against Saudi Arabia and also Iran. So the
21 Defendants' Executive Committee doesn't represent either of
22 those two defendants. Obviously Saudi Arabia is represented by
23 counsel here in court today. Iran has never appeared, has
24 defaulted. So those are the only two defendants that are
25 affected by the application that we have made to be able to use

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1 the short form to adopt existing complaints on those two
2 defendants.

3 THE COURT: Okay. Let's talk about these claims
4 differently. Obviously the claims against Saudi Arabia are, I
5 think, different procedurally because of JASTA, whereas the
6 claims against Iran, I guess the reason why we never issued an
7 order regarding adding the claims is because we just assumed
8 they were all there. So this is the first I am hearing that
9 there are plaintiffs out there who have never sued Iran and who
10 wish to now bring claims against Iran.

11 MR. MALONEY: That's correct, your Honor.

12 THE COURT: Do you have any sense of the volume of
13 plaintiffs we are talking about?

14 MR. MALONEY: It is mainly solacium relatives of the
15 decedents that were killed on 9/11. So that number starts with
16 the number of decedents, but a number of them have already
17 restated and gotten default judgment. So I don't know that the
18 volume is huge, but for every death case you may have a handful
19 of siblings or parents, so that expands -- it is one estate,
20 but it expands it by the number of plaintiffs.

21 THE COURT: So you don't believe that there are
22 decedents who have not brought claims, that there are estates
23 that have not brought claims.

24 MR. MALONEY: That's true. The majority have, but
25 there are a few hundred decedents' cases that have not been

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1 filed. But this would also allow solacium for current and
2 future amending or new complaints. We would actually identify
3 the solacium family members in order that they get a default
4 judgment hopefully and be able to participate in the Iran fund,
5 which creates some time sensitivity because the Iran fund has
6 been operating in phases. I know your Honor has signed off on
7 some of those defaults.

8 That is the basis for the application, so that we get
9 additional plaintiffs who are interested in suing Iran, they
10 are going to have to serve, we are going to have to serve those
11 complaints against Iran and get hopefully eventually a default
12 that we can then use with the Iran fund.

13 THE COURT: Okay. Just so I understand what's coming,
14 you believe that there are a few hundred estates that have not
15 yet sued Iran.

16 MR. MALONEY: Correct.

17 THE COURT: And then for each estate there is half a
18 dozen solacium claims related?

19 MR. MALONEY: Correct, your Honor.

20 THE COURT: Okay.

21 MR. MALONEY: Phase one for the Iran fund, so your
22 Honor knows, closes out September 14. So that's why it is time
23 sensitive. We had intended to get this before your Honor
24 sooner, but when we realized as a result of your Honor's ruling
25 on using the short form there was no procedural process for us

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1 to do this in the way that we are seeking to do it now, rather
2 than starting all over again and translating a brand new
3 complaint, we wanted to be able to adopt the existing
4 complaints using the short form, translate that, and have that
5 served.

6 THE COURT: So Exhibit A to your letter is the Iran
7 short form complaint, which appears to adopt the Ashton and
8 Burnett Iran complaints.

9 MR. MALONEY: Well, it gives you the option to adopt
10 either one of those. But, yes, we are not seeking to start all
11 over again. The new plaintiffs would adopt one of the existing
12 complaints and have to be subject to all of the prior rulings.
13 They would also have to serve, if they have not been a
14 plaintiff before suing Iran, they would have to serve those
15 complaints, just like the prior complaints --

16 THE COURT: So they would serve a short-form complaint
17 and the underlying complaint?

18 MR. MALONEY: Yes. Well, we would prefer just to be
19 able to serve the short form. The underlying complaint is
20 already -- we could attach that. It's been translated. It's
21 been served multiple times against Iran.

22 THE COURT: Okay. I have spoken extensively with our
23 Clerk of Court about this case and our MDL clerk, a person I
24 assume you all are familiar with. They are flooded by this
25 case. It is absolutely overwhelming the Clerk's Office. I

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1 have an obligation and a desire to facilitate their work over
2 your work, to be candid. Their preference, I think, is going
3 to be to file one new case per decedent. So if you are telling
4 me there are 300 new decedents, they are going to want 300 new
5 complaints.

6 MR. MALONEY: If that's what the court orders, we will
7 do that. I think that will probably make it more difficult for
8 them, rather than easier. If you had, say, 300 on one
9 complaint, you have one complaint, like we have had for Ashton,
10 for example. I'm not sure how that facilitates efficiency for
11 the Clerk's Office. But if that's what your Honor prefers or
12 the clerks prefer, we could do it that way. It seems to be the
13 opposite, but --

14 THE COURT: Having these cases with 300 people or
15 more --

16 MR. MALONEY: We would have to serve each of those
17 complaints individually, as well. That creates more
18 logistical, more costly for the plaintiffs. It just seems to
19 me to be inefficient but. . .

20 THE COURT: I don't know more it would be more costly.
21 You can either serve one envelope or you can serve 300
22 envelopes.

23 MR. MALONEY: The State Department charges a fee for
24 each complaint, I think \$2,000 to serve each one. That is
25 multiplied by something like 300 right there.

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1 THE COURT: I thought our filing fee was expensive.

2 MR. MALONEY: Sorry?

3 THE COURT: I said and I thought our filing fee was
4 expensive.

5 Okay. I will take that under consideration.

6 The second application is adding to the Ashton
7 complaint, and so I understand this as being very similar to
8 what we agreed to previously, only clients of, I think, the
9 Kreindler firm wish to join the Kreindler firm complaint, which
10 is the Ashton complaint.

11 MR. MALONEY: Correct, your Honor.

12 THE COURT: So this is the same thing we agreed to
13 previously, except instead of going to the consolidated amended
14 complaint, it's to the Ashton complaint.

15 MR. MALONEY: Correct, your Honor.

16 THE COURT: Same question. Do you have any sense of
17 the volume of new cases we are talking about here?

18 MR. MALONEY: As I indicated at the last conference,
19 they would include personal injury cases, and there are a few
20 thousand of those.

21 THE COURT: Do we think all of the Kreindler client
22 death cases are in at this point?

23 MR. MALONEY: Yes, your Honor. In fact, new death
24 cases are now essentially being -- now essentially retaining
25 the entire committee, at least on the personal injury and death

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1 side. So Mr. Goldman, from Anderson Kill, has been handling
2 the new decedent cases that have been coming in since the fall
3 of 2016. So we are not -- the Kreindler firm, the Ashton case,
4 is not taking on new death cases. That's not what we are
5 seeking to use the short form for. It will be personal injury
6 and solacium.

7 (Counsel confer)

8 MR. MALONEY: I'm told we have about a dozen death
9 cases that still haven't been added to the Ashton case before
10 the time where we decided to have new estates retain the
11 Plaintiffs' Executive Committee.

12 THE COURT: All right.

13 Mr. Kellogg, anything you would like to say about any
14 of this?

15 MR. KELLOGG: No.

16 THE COURT: All right.

17 MR. KELLOGG: I haven't studied it, but I doubt we
18 will have any objection.

19 THE COURT: My sense is that what's being proposed for
20 your client is a very similar form to what we have already got
21 in place for the consolidated amended complaints, but we have a
22 second complaint in that case, the Ashton complaint, so this is
23 for Ashton clients to just join that one. So I don't see an
24 issue with that.

25 Okay. I will turn to this right away. I know there

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1 is time sensitivity here.

2 Let me just reminded you, if you want judgments by
3 September 14, I will share with you that I take a vacation in
4 August and Judge Daniels might as well and so --

5 MR. MALONEY: We understand, your Honor.

6 THE COURT: Okay. I will issue at least two orders
7 from this conference, one on this last issue we are talking
8 about about the short forms, and the second one will be on a
9 schedule for any motions to compel discovery on the
10 jurisdictional issue.

11 I really do want the parties to continue doing their
12 best to meet and confer and reach agreement. I know you have
13 done that in large part. Hopefully, the discovery that you
14 received, Mr. Carter, will help you make better arguments to
15 Mr. Kellogg; and Mr. Kellogg, hopefully you will be
16 accommodating where appropriate so the parties can get this
17 phase of the litigation completed and get back to Judge Daniels
18 on the new motions.

19 Anything further from either side?

20 MR. CARTER: No, your Honor.

21 MR. KELLOGG: No, your Honor.

22 THE COURT: Thank you, everybody. Happy holiday.

23 COUNSEL: Thank you, your Honor.

24 oOo